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83-1094
NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1983

K & B, INC.,

Petitioner,

VERSUS

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals, based upon a *de novo* independent review of the record, reversed the District Court's finding of fact that no discrimination against females existed in the K&B manager trainee program during the period 1965-1972. The question presented is whether this is contrary to and violative of Federal Rule of Civil Procedure 52(a) and is contrary to past decisions of this Court.

The Court of Appeals has established the principle for Title VII cases that "zero" carries special significance; that "zero" is something other than a number; that it is relentless and unyielding evidence of discrimination which creates an irrebuttable presumption of discrimination. The question presented is whether or not this principle create a new standard of proof in violation of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny.

Because the errors of the Court of Appeals are patent on the face of its Opinion, this case is appropriate for the exercise of this Court's power to vacate and remand with directions. See, *International Ass'n of Mach. & Aerospace Wkrs. v. Terrell*, 456 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 (1982).

PARTIES TO THE PROCEEDING

In addition to the parties appearing in the caption to this petition, Andra A. Capaci was a party to this action in the courts below.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that K&B, Inc. has no parent companies, subsidiaries or affiliates as those terms are used in said rule.

DANIEL LUND

JAMES B. IRWIN

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MAY IT PLEASE THE COURT:

K&B, Inc. petitions for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on August 8, 1983 (Appendix A), and Judgment entered on August 9, 1983 (Appendix C).

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (Appendix A, *infra*) is reported at 711 F.2d 647 (5th Cir. 1983). The opinion of the district court (Appendix B, *infra*) is reported at 525 F.Supp. 317 (E.D.La. 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1983 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2000e-2 of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*) provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

Federal Rules of Civil Procedure, Rule 52(a) (28 U.S.C.) provides in pertinent part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

The facts of this case are stated in the District Court opinion (Appendix A at A-39-56 and A-70-84). K&B, Inc., was a relatively small drugstore chain with an established and stable management structure from its establishment in 1905 until 1971 when it embarked on a rapid expansion program. This expansion required the hiring of additional management personnel including manager trainees. There were two routes to this position: (1) promotion from within the ranks of the organization's employees, and (2) by reason of an entry level hiring decision.

This sex discrimination case commenced on October 8, 1974, when Andra A. Capaci, then a pharmacist with K&B, alleged that her employer discriminated in its employment practices on the basis of gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*. The Equal Employment Opportunity Commission (EEOC) was allowed to intervene on July 19, 1977, alleging that K&B had failed to promote and hire females into its management positions on the same basis as males.

There has been continuous participation by females in K&B's storewide management positions since long before the passage of Title VII.[1] K&B has, at least since 1968, affirmatively solicited females to enter its manager trainee program. However, between 1965 and 1972, although there were females solicited for the manager trainee program, and although females actually occupied various storewide

[1] K&B, Inc. Exhibit 110, photocopied and appended hereto as Exhibit 1 at A-114, reveals the progressions of females in management through the time of trial.

management positions, zero females entered the manager trainee program whereas 267 males did. This zero statistic was duly considered by the district judge on the record as a whole, which included fact witness and expert witness testimony. The district judge was satisfied from this record that the EEOC, aided by the zero statistic and any inference of discrimination it may have raised, "ha[d] not proved by a preponderance of the evidence its claim that K&B had a policy of excluding females from management positions." (Appendix B at A-87).

The District Court ruled in favor of K&B on all issues with the exception of one minor aspect of Capaci's individual disparate treatment claim not relevant here. The decision followed a long period of extensive discovery and motion practice, which culminated in a thirty-four day trial during January-April, 1979, with a thirty-fifth day of trial in April, 1980.[2] After extensive briefing by all parties and with the benefit of a transcribed record, the District Court issued its decision on October 15, 1981, dismissing, in addition to Capaci's claim discussed *supra*, the EEOC's class claim that K&B had a policy of excluding females from management positions. The District Judge wrote:

> The EEOC has presented a less than impressive statistical case ... The nonstatistical evidence of the EEOC adds little weight to its statistical case. The nonstatistical evidence produced by K&B shows that for many years before the passage of the Civil Rights Act, K&B had no policy or practice of exclusion of females from management positions. The males and females got to management by different routes, however,

[2] The bench trial was limited to liability issues.

male pharmacists became managers; female salespersons became managers.

Shortly after the Civil Rights Act became effective, the expansion programs of K&B produced changes in the management promotion procedure for both males and females ... The route to these positions was through a manager trainee program for nonpharmacists ...

The practice of promoting female salespersons directly to assistant manager ceased at about the time the Civil Rights Act became effective, and females were slow to enter the manager trainee program. As a result no female was promoted to a storewide management position for almost nine years. ...

The inferences sought by the illegal advertising allegations and the record keeping violation allegations cannot be made to bolster the case of the EEOC. (Appendix B at A-87-88)

Both Capaci and the EEOC appealed the District Court decision. After full argument, the Court of Appeals issued its Opinion on August 8, 1983, affirming in part, reversing in part, and remanding in part for further proceedings. The Court of Appeals reversed the District Court and found gender based discrimination in K&B's hiring of manager trainees during the period 1965-1972. The Court seized upon the zero statistic, "inexorable zero," (Appendix A at A-29), and ruled that it created an "insurmountable challenge" (Appendix A at A-25) to defendant to rebut. K&B filed a Petition for Rehearing and a Suggestion of Rehearing En Banc on August 22, 1983, limited to the single issue on which the reversal and remand was based. Capaci also filed a Petition for Rehearing on September 1,

1983. The Court of Appeals denied the Petitions for Rehearing and the Suggestion of Rehearing En Banc on October 3, 1983.

SUMMARY OF ARGUMENT

A female pharmacist filed a sex discrimination suit against petitioner, a chain drugstore. The EEOC intervened alleging exclusion of females from management. The District Court, as affirmed by the Fifth Circuit, dismissed all but a minor claim of the plaintiff. The trial court dismissed all aspects of the EEOC claim, but the Court of Appeals partially reversed, finding that discrimination occurred in the limited time period from 1965 to 1972 in one management position, manager trainee. The Fifth Circuit decision (1) violates the clearly erroneous rule of F.R.C.P. 52(a) and (2) improperly applied an irrebuttable presumption of discrimination.

The scope of appellate review is limited by the Rule 52(a) "clearly erroneous" standard. This Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) overruled the Fifth Circuit's ultimate fact/subsidiary fact dichotomy which the Fifth Circuit had previously relied upon to decide Title VII cases without being tethered to the "clearly erroneous" rule. Nevertheless, in the instant case, the Fifth Circuit has gone back to its old ways. While paying lip service to the *Swint* admonition, it proceeded to weigh and balance the evidence, minimized the witnesses and testimony found convincing by the trial court, and reversed and rendered an ultimate determination of discrimination, just like it did before.

In the process, the Fifth Circuit held that since "zero" females entered the manager trainee program from

1965 until 1972, an irrebuttable presumption of discrimination arose which was "insurmountable." The "inexorable zero" could not be overcome by the fact that the company made offers to female manager trainee applicants which were rejected or by the fact that throughout, before, and after this period of time, females occupied positions of store management.

The Fifth Circuit deference to the zero statistic and its elevation of the "inexorable zero" creates a new but improper standard of proof for Title VII plaintiffs. It has doomed an employer to defeat as soon as the zero goes into evidence. No explanation will do. With this unique standard, the Fifth Circuit has erred and has departed from the guidelines of *McDonnell Douglas* and its progency.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT VIOLATES FED. R. CIV. P. 52(a) AND IS CONTRARY TO DECISIONS OF THIS COURT.

The Court of Appeals did not reverse the District Court for an erroneous view of the law. The reversal of the trial court was entirely on the facts. In so doing, as the Court's own comments indicate, it exceeded the narrow scope of review in cases of this type. That scope of review is limited by Fed. R. Civ. P. Rule 52(a), the "clearly erroneous" rule of appellate review. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982). A "clearly erroneous" fact finding is one which is not supported by

sufficient evidence, *Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980), so that it can be said to be without substantial evidence to support it. *Merchants National Bank v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981). "In the absence of clear error, the evidence must be viewed in the light most favorable to the party who prevailed below." *Dillon v. M.S. Oriental Inventor*, 426 F.2d 977, 978 (5th Cir. 1970).

Findings of discrimination and the assessment of the relative probative force of the parties' statistical evidence are "undoubtedly factual." *Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C. Cir. 1983). This Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949), "where the evidence would support a conclusion either way but where the trial court has decided [the evidence] to weigh more heavily for the defendants, [s]uch a choice between two permissible views of the weight of the evidence is not clearly erroneous. And, this Court wrote, "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969).

Although the Court of Appeals rendered lip service to the mandate of Rule 52, a reading of the Court's analysis of the evidence relevant to the issue of discrimination reveals numerous statements evidencing that the Court improperly substituted its own construction of the record for that of the trial court without finding that the trial court was clearly in error. Examples are (1) the Court's differing view of the weight to be attached to advertising evidence (Appendix A at A-22); (2) its differing view of the probative

weight and value of expert testimony (*id.* at A-15) and of the fact witness testimony (*Id.* at A-16, 17, 20); (3) its isolating of the data presented in K&B Exhibit No. 110 to the period July 1965-1972 (*Id.* at A-114) rather than viewing it for the entire period covered, 1947-1979; (4) its preoccupation with the zero statistic to which repeated reference was made (*Id.* at A-4, A-5, A-8, A-26, A-28 and A-29); and (5) its dismissal of the trial court's findings as to the existing legitimate reasons for the observed result and its undue emphasis on the zero statistic, to wit: "...zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes." (*Id.* at A-28).

Findings of the type here involved are purely factual. *Pullman-Standard v. Swint, supra; Trout v. Lehman, supra.* In *Swint*, on writ from the Fifth Circuit Court of Appeals, this Court admonished that in Title VII cases the standard of review is a narrow one under Federal R. Civ. P. 52(a), the "clearly erroneous" rule. In *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), *rev'd.*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the Court of Appeals was presented with a statistical case in which "zero" was a factor in the evidence and in the Court's reversal reasoning. In a manner which appears to be indistinguishable from the instant case, the Court conducted its own review of the record and reversed a lower court finding of no discrimination, emphasizing that the evidence contrary to the inference of discrimination drawn from the zero statistic simply was not sufficient to rebut the plaintiff's case.

This Court reversed, *Pullman-Standard v. Swint, supra*, finding that questions of discriminatory intent *vel non* were purely factual, regardless of their primary or subsidiary nature, and subject to the clearly erroneous rule. As here pertinent, Justice White wrote for this Court:

> The rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination. It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard. It is not a question of law and not a mixed question of law and fact. *Id.* (102 S.Ct. at 1789)

Rejecting the contention that the clearly erroneous rule had in fact been applied by the Court of Appeals, this Court ruled,

> First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52, the acknowledgement came late in the court's opinion. The court had not expressly referred to or applied Rule 52 in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant ... Furthermore, the paragraph in which the court finally concludes the USW seniority system is unprotected by §703(h) strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record. (*Id.* at 1791)[3]

[3] This Court's reimposition of the clearly erroneous standard in 5th Circuit civil rights cases was outcome determinative in *Robbins v. White-Wilson Medical Clinic, Inc.*, 682 F.2d 503 (5th Cir. 1982), earlier opinion, 660 F.2d 1064 (5th Cir. 1982). *See also, Terrell v. United States*

The Court of Appeals in the instant case, as in *Swint, supra*, invoked the "clearly erroneous" rule of appellate review. In *Swint*, it was found that the rule was not, however, properly applied because of the Fifth Circuit's ultimate fact/subsidiary fact dichotomy applied in Title VII cases. In the face of the argument that Rule 52 had been properly applied, this Court examined the appellate opinion in order to define that which is an improper independent examination of the record.

Here, such examination of the appellate Opinion can lead only to one conclusion. A fact finding of nondiscrimination in manager trainee hiring which is not clearly erroneous has been reversed solely because of the Court of Appeals' independent conclusion regarding the significance of the zero statistic.

Petitioner acknowledges that the Court of Appeals invoked the narrow scope of review mandated by the "clearly erroneous" rule and that the Court of Appeals was convinced that a mistake had been made. But, the path to that determination reveals that the Court of Appeals reversed findings of fact that were not clearly erroneous only because it chose to view the evidence in a different light from that in which the trial court viewed it and without focusing on the evidentiary bases which constituted "sufficient evidence," *Robbins v. White-Wilson Medical Clinic, Inc., supra* at 503, for the District Court's findings. (See *Swint, supra*, at footnote 21).

(Footnote 3 continued)
Pipe & Foundry Co., 696 F.2d 1132 (5th Cir. 1983) (Grooms, J., dissenting) (remanded to trial court on issue of discriminatory intent after Fifth Circuit's decision vacated by this Court).

Although the Court of Appeals noted in its Opinion (Appendix A at A-26), that "The scope of review in this case is a narrow one," the preceding 23 pages were written as an independent review of the facts from the Court's *own* starting point, the zero statistic. Examples supporting this contention follow.

The District Court considered the same "zero" (Appendix B at A-44) but ultimately found, after weighting all the evidence, that the testimony of petitioner's well versed expert, an applied statistician and industrial psychologist, supported by fact witness testimony and actual employment experiences, overcame any inference of discrimination urged by the EEOC. The Court of Appeals simply superimposed on the record its own view of "zero," to wit: "...to us it carries special significance" (Appendix A at A-28), expressly finding that the District Court's analysis was impermissible on this record.

The District Court extensively reviewed the advertising evidence which was vast, and found it "less than persuasive as reflecting a policy of excluding females from the manager trainee program." (App. B at A-83) The Court of Appeals looked at the same evidence, and while finding it "not determinative" (apparently in agreement with the sense of the ruling below), cited the evidence as one of three principal reasons for reversal. (App. A at A-28) This cannot be construed as other than a substitution of the Court of Appeals' evaluation of the significance of the advertising evidence for that of the District Court.

The District Court, after hearing expert testimony and numerous fact witnesses, concluded that the self-selection factor as affecting female interest in the manager trainee program in its earlier years had a reasonable basis

in fact. (App. B at A-55) The Court of Appeals found "some merit" to the argument (thus indicating sufficient evidence to support it), but unlike the District Court, could not accept it "as an explanation" for the zero statistic. (App. A at A-8) The Court of Appeals did not find that the lower court was clearly erroneous in its consideration of this factor; it merely attributed less weight to the self-selection testimony. Rule 52 appellate review does not include weighing the evidence.

Contrary to the District Court's evaluation of the credibility and significance of witness testimony and inferences to be drawn therefrom, the Court of Appeals wrote, "There is no reason to believe that the female witnesses called were representative of all women in the labor market or employed by the defendant." (*Id.* at A-8) Many of these witnesses were called and accepted as representative of petitioner's female pool of potential hires for the manager trainee position. The Court of Appeals did not find that their acceptance as such was clearly erroneous.

The Court of Appeals decided to view the statistics regarding entries of all females into management as reflected on K&B Exh. No. 110 (Exhibit 1 appended herein at A-114) in isolation between July, 1965 and 1973, but this exhibit was intended to be viewed and was viewed at the trial level in its totality from 1947 through 1979. Furthermore, the Court of Appeals in venturing independently into the record has mistaken it by ignoring two Chief Pharmacist (CRX) promotions between 1965 and 1973 (Miller and Luizza, See K&B Exh. 110, *Id.*) and by concluding that promotions in March and May, 1965 (after passage of the Act but before the effective date of 42 U.S.C. §2000e-2), also should be ignored (Callihan and Reese—See K&B Exh.

110, *Id.*) The District Court justifiably did not see it this way.

Unlike the District Court, the Court of Appeals decided that the testimonies of Genevieve Ronquette, Lillian Hennessey, Blanche Callihan and Inez Nungesser, who represented combined experience with K&B of over 120 years, were "unhelpful on the issue of discrimination against manager trainees[4] in the 1965-72 period." (App. A at A-17) Each of these females was in management not only prior to the effective date of the Act, but for all or most of the time period the Court of Appeals chose to study. (K&B Exh. 110 at A-115) The district judge below found this testimony extremely helpful given their long histories with K&B. The Court of Appeals did not find the lower court's reliance on this testimony to be clearly erroneous.

The Court of Appeals examined the testimony of "male executives" as did the District Court. But the Court of Appeals, unlike the District Court, concluded that such testimony, "...if carefully examined, does not support a finding of nondiscriminatory treatment in the 1965-1972 period." (App. A at A-18) This testimony consumed several trial days, covered most of the history of K&B, including the involved period, and was very important to the entire case. All the Court of Appeals did was assess it differently on a cold record.

There are multiple problems in the Court of Appeals' approach. First, there is no logic to it. K&B clearly has not discriminated against females in its entire history. The

[4] This reference evidently is a mistake. There is no allegation of discrimination against manager trainees.

Court of Appeals agrees that even in 1965-1972 all other positions under attack and all promotions were free of discrimination. It is not realistic to conclude that a company which has demonstrated the utilization of qualified females in management positions for over 30 years would at particular points in time reject qualified females, or would discriminate in one job category but not in another, or would hire a proportion of female pharmacists greater than that which exists in the State as a whole and promote them accordingly to management, but would not be willing to do so in the lowest management position during times when there was a severe shortage of qualified applicants.

Second, and more fundamentally, the Court of Appeals' approach evidences a casual disregard of the district court's fact findings, according them no deference much less a presumption of validity. This is a clear and self-evident departure from the clearly erroneous standard and is contrary to the *Pullman-Standard* and *Inwood Laboratories* mandates.

In *Inwood Laboratories v. Ives Laboratories, supra*, this Court reiterated and reemphasized its position on Fed. R. Civ. P. Rule 52(a). Justice O'Connor wrote that the Rule

> ...recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. ... Because of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed', ... it must accept the trial court's findings. 102 S.Ct. at 2189. [Citations omitted]

and ruled in that case (as modified to fit the instant case):

> By rejecting the District Court's findings simply because it would have given more weight to [the zero statistic] than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the [statistical evidence] were not clearly erroneous, they should not have been disturbed. [Brackets inserted]
>
> * * * * *
>
> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. *Id.* at 2189-2190.

The record made below did contain sufficient evidence to support the District Court's finding that discrimination against females in the manager trainee hiring was not proved and the finding of the nondiscriminatory reason for the zero statistic. The following are uncontroverted portions of the record which relate specifically to the 1965-1972 period:

1) The testimony of Besthoff and Feltman which convinced the District Court that the company did not discriminate but rather sought qualified females for the manager trainee position.

2) The testimony given by Hennessey, Nungesser, Ronquette and Callihan, each of whom was a female in management during the involved period and each of whom was convincing in her statements that discrimination was

no part of the K&B organization.

3) By 1965, K&B had already promoted seven females to management in a relatively small and stable management structure. Between 1965 and 1972, there were twelve females in management and others were solicited.

The Court of Appeal's statement that "Evidence of two or three acts of hiring women as manager trainees during this period ... would indicate at least some willingness to consider women as equals in firm management" (App. A at A-28, 29) is incomprehensible on the basis of this record. The Court grasped a single statistic for a single job and limited time period and, placing undue emphasis on it while sidelining the District Court's findings, came up with a conclusion that cannot be squared with a realistic appraisal of petitioner's employment practices over its entire history.[5] In doing so the Court clearly exceeded the limited scope of review in cases of this type.

THE FIFTH CIRCUIT HAS ESTABLISHED THE PRINCIPLE FOR TITLE VII CASES THAT "ZERO" CARRIES SPECIAL SIGNIFICANCE; THAT "ZERO" IS SOMETHING OTHER THAN A STATISTIC; THAT IT IS RELENTLESS AND UNYIELDING EVIDENCE OF DISCRIMINATION WHICH CREATES AN IRREBUTTABLE PRESUMPTION OF DISCRIMINATION. THIS PRINCIPAL CREATES A NEW STANDARD OF PROOF IN VIOLATION OF *McDONNELL DOUGLAS CORP. V. GREEN*, AND ITS PROGENY

[5] The Court of Appeals discussed Besthoff's and Feltman's testimony about efforts to solicit qualified females beginning in the early 1970's (See discussion, App. A at A-18, 19) but it is not clear what

As its Opinion reveals, the Fifth Circuit was completely preoccupied with "zero" and made repeated references to it. Five paragraphs of the Opinion make explicit reference to it (Appendix A at A-5, A-8, A-26, A-28 and A-29). This preoccupation with "zero" culminated in the finding that "the inexorable zero" (Appendix A at A-29) created not only "a great" but an "*insurmountable* challenge" to defendant to explain (Appendix A at A-25) (emphasis added).

It is the petitioner's position that the Fifth Circuit has misconstrued the significance of "zero" which is but a crude statistic. In so doing, it has elevated this raw number to a position of special significance thereby creating a principle of proof which violates the prior holdings of this Court. In substance, the Fifth Circuit, by giving special significance to "zero", has stated that "zero" creates not only a *prima facie* case, but an irrebuttable presumption of discrimination incapable of being overcome by a defendant in a Title VII suit. The road to this result is best illustrated by reviewing the history of "inexorable zero" from its genesis in Fifth Circuit jurisprudence.

The term "inexorable zero", first appeared in *United States v. T.I.M.E.-D.C.*, 517 F.2d 299, 315 (5th Cir. 1975). In *T.I.M.E.*, an employment discrimination action brought by the United States, the district court found on the basis

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(Footnote 5 continued)
importance the Court attached to this. If these efforts at affirmative action were construed as suggestive of discrimination prior to that time, nothing could be more wrong because the Act (42 U.S.C. §2000e-2), while making it unlawful to discriminate, does not impose the obligation of affirmative action. Such affirmative action steps taken by K&B and described by its witnesses were voluntary. They demonstrate an attitude wholly inconsistent with the Court's independent finding.

of the record as a whole that the defendant had discriminated against minorities. As revealed at page 693 of the district court opinion (*U.S. v. T.I.M.E.-D.C., Inc.*, 6 FEP Cases 690 (N.D. Tex. 1972), its finding was reached after reviewing not only the relevant statistics but also the testimony of the witnesses. The statistical evidence included "zero" as a statistic, but "zero" carried no special significance to the district judge who made no reference to it in his opinion. The district judge was affirmed by the Fifth Circuit, *United States v. T.I.M.E.-D.C., supra*, who, in rejecting the arguments of the defendant/appellant that the statistics required further refinement to be meaningful, noted that further refinement would not be particularly helpful because the defendants inability to rebut the statistics "...came from the inexorable zero" (*Id.* at 315). This is the first appearance of "inexorable zero" in Title VII jurisprudence.

This Court affirmed the district court and the Fifth Circuit in their respective rejections of the defendant's attacks on the statistics. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). In footnote 23 of this Court's opinion, Mr. Justice Stewart wrote:

> "In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the Company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' " (431 U.S. at 341, n. 23).

As this Court noted in rejecting the arguments asserted by the company against the use of statistics in Title VII cases,

both the district court and the Court of Appeals "found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII." (*Id.* at 341). From the district court to the Supreme Court there was never any judicial disagreement that the record as a whole supported such finding.

Despite the repeated references to "inexorable zero" in subsequent Fifth Circuit jurisprudence, this Court's footnote reference to "inexorable zero" is the only such reference found in Supreme Court decisions. It is submitted that this Court did not intend by its footnote reference to attach any special significance to "zero" or to suggest that its presence in a case creates an irrebuttable presumption of discrimination.

Following *T.I.M.E.-D.C., Inc.*, the Fifth Circuit decided *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981). Here the Court indicated that it was attaching special significance to "zero". Although not an "inexorable zero" case, the court noted in its concluding statements that sound statistical analysis, being both complex and arduous, presents a difficult task to judges who are laymen in the statistical arena. "Our innate capacity in such matters extends to 'the inexorable zero' and perhaps, unevenly, somewhat beyond;...." (*Id.* at 410). Thus, the Fifth Circuit on the one hand stated that statistics and their analysis must be presented in an orderly fashion by experts, but that where "zero" is concerned judges, as laymen, have the "innate capacity" to attach special significance to this integer.

This special significance became more apparent in *Pegues v. Mississippi State Employment Service*, 699 F.2d

760 (5th Cir. 1983), *reversing* 488 F.Supp. 239 (N.D. Miss. 1980). *Pegues* was a race discrimination case involving employment referrals. The district judge noted that, "[w]hen the evidence is considered *as a whole,* the court has concluded that plaintiffs..." had not proved their case by a preponderance of the evidence. (*Id.* at 256-7) (emphasis added). The Fifth Circuit also purported to review the entire record in reversing the district court's findings but made a special point of noting that "the statistical disparities ... approach the 'inexorable zero' decried by the Supreme Court in *International Brotherhood of Teamsters....*" (*Id.* at n. 9).

Carroll v. Sears, Roebuck & Co., 514 F.Supp. 788 (W.D. La. 1981) was a Title VII class action in which allegations of race discrimination in employment practices were made "across-the-board". The district judge held, after a detailed review of all the statistical and testimonial evidence, that plaintiffs had failed to prove their claims. Insofar as the promotion claims were concerned, the Fifth Circuit reversed noting that among the category of "other managers" only 2 of 49 were black in 1974, "...and there were no blacks of 28 in 1977." *Carroll v. Sears, Roebuck & Co.,* 708 F.2d 183, 193 (5th Cir. 1983). Of this "zero" the court wrote,

> "These comparisons, and *especially the 'inexorable zero'* found in the salaried employee category, show a gross disparity in the treatment of blacks in promotion to top managerial positions" (*Id.*)

Carroll was decided on June 30, 1983. On August 8, 1983, the Fifth Circuit decided the instant case, *Capaci v. Katz & Besthoff, Inc.,* 711 F.2d 647 (5th Cir. 1983). In this

case, the "inexorable zero" has completed its journey through Fifth Circuit jurisprudence. "Zero" is no longer a number; it is now a highly significant piece of evidence which, standing alone, creates an irrebuttable presumption of discrimination in conflict with the applicable decisions of this court. Any fair reading of the Fifth Circuit's opinion reveals this, particularly the following quoted excerpts:

> "We differ with the defendant's suggestion that 'zero is just a number.' To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning firm policies and attitudes .... perhaps for this reason the courts have been particularly dubious of attempts by employers to explain away 'the inexorable zero' when the hiring columns are totalled." [Citing *Teamsters* and *Wilkins*] (Appendix A at A-28, 29)
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> "On the other hand, if there were no adverse effects on women [from K&B's advertising practices], then Dr. Gastwirth's statistical case is strengthened, and the defendant faces a great, and in our view *insurmountable*, challenge to explain why all 265 manager trainees hired from the external labor force in the 1965-1972 period were men." (Appendix A at A-25) (emphasis added; footnote omitted)

"Zero" standing alone is a crude statistic and nothing more. Both experts who testified in this case agreed with this statement. Clearly, statistics, including the statistic "zero", may be relied upon to create a *prima facie* case, *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 52 L.Ed.2d 768 (1977). However

this Court has written that all references to statistical evidence should be tempered by the other evidence which "brings the cold numbers convincingly to light." *International Brotherhood of Teamsters v. United States, supra,* (97 S.Ct. at p. 1856). More fundamentally, it has become a hornbook principle in Title VII cases that where statistical evidence is relied upon to support a *prima facie* case of discrimination, the defendant has the opportunity to rebut the inference of discrimination. The District of Columbia Court of Appeals recently reiterated the rule succinctly.

> If the plaintiffs have used statistics to make out a *prima facie* case, the defendants may rebut the inference of discrimination by presenting a legitimate, nondiscriminatory explanation for the observed statistical disparity or by raising a genuine issue of material fact concerning the accuracy of the picture painted by the plaintiffs' statistics. See *International Brotherhood of Teamsters v. United States,* 431 U.S. at 360, 97 S.Ct. at 1867; *Croker v. Goeing Co. (Vertal Division),* 662 F.2d 975, 991 (3rd Cir. 1981) (en banc)." *Trout v. Lehman,* 702 F.2d 1094, 1101 (D.C. Cir. 1983).

According to this Court's decisions in *McDonnell Douglas Corp. v. Green, supra,* and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the ultimate burden of persuasion always rests with the plaintiff. The framework for evaluating the evidence in determining whether or not this burden has been carried is this: (1) the plaintiff puts on a *prima facie* case; (2) the defendant rebuts same and if the rebuttal is successful in the sense that the defendant has articulated a nondiscriminatory reason for the observed results, the plaintiff must then prove that the defendant's

proffered reasons are pretextual. This framework was recently reaffirmed in *United States Postal Service Board of Governors v. Aikens*, __ U.S. __, 103 S.Ct. 1478, __ L.Ed.2d __ (1983), where the Court reiterated its earlier statement in *Burdine* that once the defendant has carried his burden of production to rebut the *prima facie* case, any presumption of discrimination "drops from the case." *Id.* at 1482.

In the instant case, the Fifth Circuit's ruling is in conflict with these decisions because the presumption of discrimination resulting from the "inexorable zero" has been elevated to irrebuttable status; the presumption can never "drop" from the case; thus, the Appellate Court has stated that faced with a "zero", there is no legitimate, non-discriminatory reason which can be advanced by a defendant to explain the observed result.

The history of the Fifth Circuit's handling of the "inexorable zero" puts its flawed understanding in focus. The Court of Appeals first ran afoul in *Wilkins* when it carved the number zero out of the complex science of statistics and expounded that it was lay evidence in the realm of judges which carried special significance. Having made this fundamental wrong turn in *Wilkins*, a skewed path through the Fifth Circuit jurisprudence was not unpredictable: Next, it distorted this Court's view of the zero statistic by mischaracterizing the *Teamster* decision as having "*decried*" the "inexorable zero", when all the Supreme Court did was quote the Fifth Circuit's use of the term in a footnote.

Petitioner submits that the District of Columbia Circuit in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), has kept the number "zero" in its

proper statistical place and has kept the "inexorable zero" in its proper judicial perspective, which is: that zero is evidence which can and may raise an inference of discrimination, but it is not "insurmountable."

CONCLUSION

The Court of Appeals exceeded the narrow scope of review in Title VII cases by reversing a finding of fact by the District Court which is not clearly erroneous and not erroneous at all. Furthermore, the Court of Appeals has created a new but improper standard of proof in Title VII cases, one which results in an irrebuttable presumption of discrimination where the specially significant "zero" is introduced. In all but the most exceptional case, there will be evidence of the availability of some members of a protected class for a particular job under study. Whenever that availability is contrasted against a zero, the instant decision will be relied upon to support an irrebuttable presumption of discrimination. Indeed, summary judgments on this issue would be a probable result of the Fifth Circuit's "inexorable zero".

Supreme Court jurisprudence has provided the framework for evaluating the evidence in Title VII cases. That framework and the pronouncements of this Court instruct the lower courts that Title VII cases, like other civil litigation, must be decided on the basis of the whole record. An irrebuttable presumption of discrimination is heretofore unknown in cases of this type. The opportunity to rebut a *prima facie* case, including the presumptions therein, should and must be preserved.

The instant case involves manifest error and harmful precedent. This Court is urged to correct the errors below.

Vacating the Fifth Circuit opinion and judgment is clearly warranted.

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